

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 384 OF 2007.

1. Namdeo Krishna Atole,
Age: 92 years, Occ.: Agriculture.
 2. Narayan Krishna Atole
Age: 80 years, Occ.: Agriculture.
 3. Pandharinath Krishna Atole,
Age: 78 years, Occ.: Agriculture.
 4. Dattoba Krishna Atole,
Age: 75 years, Occ.: Agriculture,
All residing at Khandaj,
Taluka Baramati, Dist. Pune.
 5. Smt. Girjabai Bhagwanrao Bhagat,
Age: 65 years, Occ.: Household,
Residing at Korhale Bk. Taluka:
Baramati, Dist. Pune.
 6. Uttam Narayan Atole,
Age: 58 years, Occ.: Agriculture,
residing at Khandaj, Taluka:
Baramati, Dist. Pune.
- ... Appellants.

Versus.

1. Dnyandeo Krishna Atole,
Age: 82 years, Occ.: Agriculture,
residing at Khandaj, Taluka
Baramati, Dist. Pune.
2. Sou. Gangubai Gabaji Gawade,
Age: 60, Occ.: Household,
residing at Gunaware, Taluka
Phaltan, Dist. Satara.
3. Smt. Shevantabai Baburao Khomane,
since deceased by her heirs:
- 3A. Bapurao @ Banyabapu maruti Khomane,
Age: 90 years.
- 3B. Shivaji Bapurao Khomane,
Age: 52 years.
- 3C. Tanaji Bapuro Khomane,
Age: 60 years,
All Agriculturists, residing at
Korhale Khurd, Taluka Baramati,
Dist. Pune.
4. Vikram Namdeo Atole,
Age: 60 years, Occ.: Agriculture,
5. Sonabai Namdeo Atole,
Age: 70 years, Occ.: Agriculture.
6. Smt. Shindubai Vikram Atole,

- Age: 58 years, Occ.: Agriculture.
7. Shri Kalyan Narayan Atole,
Age: 55 years, Occ.: Agriculture.
8. Vishwas Pandharinath Atole,
Age: 55 years, Occ.: Agriculture.
9. Sau.Tanubai Dattoba Atone,
Age: 70 years, Occ.: Household,
Nos.4 to 9 are Agriculturists,
residing at Khandaj, Taluka:
Baramati, Dist. Pune. ... Respondents.

Shri A.A.Kumbhakoni, Associate Advocate
General with Shri Parag Shelke for the Appellants.

Shri Milind Deshmukh for the Respondent No.1.

CORAM : ABHAY S.OKA, J.

DATED : 20th December, 2007.

ORAL JUDGMENT.:

1. I have heard submissions of Shri A.A.Kumbhakoni, the learned Associate Advocate General on last two dates fixed in the Appeal. The Appellants are the original Defendants Nos.1 to 4 and 7 and 11. The 1st Respondent is the original Plaintiff.

2. The 1st Respondent filed a suit for partition and separate possession of 1/5th share in the suit property. According to the case of the 1st Respondent, the suit properties described in paragraph 1 of the plaint were the ancestral properties of one Krishna Vithoba Atole. The 1st Respondent is one of the sons of deceased Krishna. The Appellant Nos.1 to 4 are the

other sons of the deceased Krishna. Appellant No.5 is one of the daughters of deceased Krishna and Appellant No.6 is the son of the Appellant No.2.

3. The said Krishna died on 14th October 1959. His widow died in the year 1974. According to the 1st Respondent, partition of the suit property was not effected. On 29th January 1973 the Appellants Nos.1 to 4 got a mutation entry No.4478 made in the revenue records by which their names along with the name of Defendant No.8 were entered in respect of the land bearing Gat No.332 and 440 out of the suit properties. The first Respondent prays for partition and separate possession of his share in the suit property.

4. The defence of the Appellants was that the partition of the suit properties has been effected long back and in the said partition the 1st Respondent was allotted 1/5th share. According to the Appellants the land bearing Gat No.460 was allotted to the share of the 1st Respondent while land bearing Gat No.332 and 440 were allotted to their share. According to the Appellants, the widow of the deceased and the daughters of the deceased Krishna did not claim any share in the partition. Various particulars of partition have been set out by the Appellants in their written statement. The trial Court dismissed the suit by accepting the case

made out by the Appellants. In the alternative, the Appellant made a counter-claim in respect of land bearing Gat No.621. It was contended that the Appellant has advanced a sum of Rs.79,000/- for acquiring the Gat No.621 in the name of the 1st Respondent's wife. As a security for the repayment of the amount, the 1st Respondent had placed the Appellants in possession of land bearing Gat No.460. It was submitted that if the suit properties are held to be joint properties, even Gat No.621 should be subjected to partition.

5. In the Appeal preferred by the 1st Respondent/Plaintiff, the Appellate Court has set aside the decree of the trial Court and has passed a decree for partition and separate possession of 1/5th share of the 1st Respondent.

6. The submission of the learned Counsel appearing for the Appellants is that there was more than sufficient documentary evidence on record to show that the partition was effected amongst the brothers in the year 1960. His submission is that in the earlier suit filed by the 1st Respondent for perpetual injunction, he did not allege that the suit properties were joint family properties. He pointed out that the consideration for acquiring the land bearing Gat No.621 was paid by the Appellants nos.1 to 4. He pointed out

that however the sale deed of the said land was executed in the name of the wife of the 1st Respondent. He pointed out that the total amount of Rs.79,000/- was advanced by the Appellants Nos.1 to 4 to the 1st Respondent for acquiring the land bearing Gat No.621 and it was agreed at that time that the Appellants Nos.1 to 4 would enjoy land bearing Gat No.460 in lieu of interest payable by the 1st Respondent till the entire amount was repaid by the 1st Respondent. He submitted that the decision in Regular Civil Suit No.345 of 1973 filed by the 1st Respondent will operate as res-judicata. He pointed out that in the alternative the Appellants had made a counter claim for claiming a share in Gat No.621.

7. I have given careful consideration to the submissions made by the learned Counsel appearing for the Appellants. According to the case of the 1st Respondent, till the year 1973 the brothers i.e. sons of deceased Krishna were in joint cultivation of the suit land. According to the case of the 1st Respondent/Plaintiff alluvial land admeasuring 2 acres and 39 gunthas was allotted by the State Government in his favour. According to the 1st Respondent, his wife is the owner of the land bearing Gat No.621 as his wife has paid the entire consideration to the owners of the said land bearing Gat No.621. The 1st Respondent denied to

have received any amount from the Appellants for acquiring the said land. The 1st Respondent also examined his wife who deposed regarding payment of consideration of Rs.30,000/- for acquiring the land bearing Gat No.621. She stated that she had borrowed the said amount from her mother.

8. The 1st Appellant is the only witness examined by the Appellants on the point of partition and the transaction relating to Gat No.621. The Appellate Court has referred to the documentary evidence on record and especially the revenue records. The Appellate Court has referred to the mutation entry No.4473 and observed that there is no reference in the said mutation entry to the effect that the land bearing Gat No.460 was allotted to the 1st Respondent in the partition. The finding of fact recorded on the basis of appreciation of the evidence on record is that the Appellants have failed to prove earlier partition. It is not possible to interfere with the said finding in Second Appeal. The Appellate Court has referred to the admission of the 1st Appellant that the registered document evidencing handing over of possession of Gat No.460 was not executed.

9. The Appellate Court has referred to Regular Civil Suit No. 345 of 1973 filed by the 1st Respondent

(original Plaintiff) against Defendants Nos.1 to 4 and 6 in the present suit. It was a suit simplicitor for perpetual injunction in respect of land bearing Gat No.460. The said suit was dismissed and an Appeal preferred by the Respondent No.1 was also dismissed. In the said suit, a Written Statement was filed by the 1st Appellant herein (original Defendant No.1) stating that the Plaintiff was allotted Gat No.460 in partition and Gat Nos.332 and 440 were allotted to the Appellants Nos.1 to 4 (Defendants Nos.1 to 4). In the said suit also the Appellants Nos.1 to 4 contended that they had advanced amount for purchase of Gat No.621 and as a security for repayment of the amount, land bearing Gat No.460 was placed in possession of the said Appellants. The Appellate Court observed that the issue regarding the question whether Gat No.460 was a joint family property did not arise for consideration in the said suit. The Appellate Court, therefore, held that the decree passed in the said suit will not operate as res-judicata.

10. The finding of fact which is recorded is that the Appellants have failed to establish that the land bearing Gat No.460 was placed in their possession as and by way of security for repayment of the amount advanced to the Plaintiff for purchasing land bearing Gat No.621.

11. Even going by the assertions of the Appellants, by no stretch of imagination, the land bearing Gat No.621 can be held to be the property of the joint family. Therefore, it was rightly held that there was no merit in the counter claim filed by the Appellants Nos.1 to 4.

12. In my view no substantial question of law arises. The Appellate Court was right in passing a decree for partition and separate possession as the Appellants could not substantiate their plea of prior partition.

13. No substantial question of law arises. The Second Appeal is accordingly dismissed. No order as to costs.

Judge.